

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

5	GREG D. SCHWARZ,)	
6	Plaintiff,)	No. CV-10-226-JPH
7	v.)	ORDER GRANTING DEFENDANT'S
8	MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
9	of Social Security,)	
10	Defendant.)	
11)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on May 6, 2011 (Ct. Rec. 12, 15). Attorney Lora Lee Stover represents plaintiff; Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 3). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment (**Ct. Rec. 15**) and **DENIES** plaintiff's motion for summary judgment (Ct. Rec. 12).

JURISDICTION

Plaintiff protectively applied for disability insurance benefits (DIB) on November 10, 2005, alleging disability beginning November 21, 2004 (Tr. 63-65). The application was denied initially and on reconsideration (Tr. 34-35, 41-43).

At a hearing before Administrative Law Judge (ALJ) Richard

1 Say on November 8, 2007, plaintiff, represented by counsel, and a
2 vocational expert testified (Tr. 512-531). On November 30, 2007,
3 the ALJ issued an unfavorable decision (Tr. 15-26). The Appeals
4 Council denied review on June 2, 2010 (Tr. 4-7). Therefore, the
5 ALJ's decision became the final decision of the Commissioner,
6 which is appealable to the district court pursuant to 42 U.S.C. §
7 405(g). Plaintiff filed this action for judicial review pursuant
8 to 42 U.S.C. § 405(g) on July 21, 2010 (Ct. Rec. 1).

9 **STATEMENT OF FACTS**

10 The facts have been presented in the administrative hearing
11 transcript, the ALJ's decision, the briefs of the parties, and are
12 briefly summarized here when relevant.

13 Plaintiff was 54 years old at the hearing. After graduating
14 from high school, he completed two years of both college and
15 technical training (Tr. 514). He worked at a television station as
16 an engineer for 28 years (Tr. 82, 93, 104), a job not listed in
17 the DOT but described by the VE as a personnel manager, computer
18 operations manager, and department manager (Tr. 526). Mr. Schwarz
19 became disabled in November 2004 due to problems related to sleep
20 apnea (Tr. 515-516). He was terminated by "mutual agreement" with
21 his employer (Tr. 110). Plaintiff testified he experiences
22 fatigue, arthritis, a lack of stamina, pain, an impaired ability
23 to exercise, and vertigo. He has a short attention span and
24 concentration problems. Five to eight days a month, he would not
25 be able to work even part-time (Tr. 516-517, 523-524). He is
26 married. He helps with cooking, drives, shops, and attends church
27 and Bible study. He enjoys swimming, scuba diving and photography.
28 Mr. Schwarz can lift ten pounds and walk two blocks (Tr. 517-519).

1 His application alleged disability due to chronic fatigue, sleep
2 apnea, hypertension, fibromyalgia, arthritis, chronic flushing
3 syndrome, restless leg syndrome (RLS), reflux disease, colitis,
4 memory loss, and concentration problems (Tr. 109). On appeal, he
5 asserts error solely as to evidence of physical impairments and
6 limitations.

7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the Act) defines disability
9 as the "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental impairment
11 which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than
13 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
14 also provides that a Plaintiff shall be determined to be under a
15 disability only if any impairments are of such severity that a
16 plaintiff is not only unable to do previous work but cannot,
17 considering plaintiff's age, education and work experiences,
18 engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
20 Thus, the definition of disability consists of both medical and
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
22 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled.
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
26 is engaged in substantial gainful activities. If so, benefits are
27 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
28 the decision maker proceeds to step two, which determines whether

1 plaintiff has a medically severe impairment or combination of
2 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

3 If plaintiff does not have a severe impairment or combination
4 of impairments, the disability claim is denied. If the impairment
5 is severe, the evaluation proceeds to the third step, which
6 compares plaintiff's impairment with a number of listed
7 impairments acknowledged by the Commissioner to be so severe as to
8 preclude substantial gainful activity. 20 C.F.R. §§

9 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,

10 App. 1. If the impairment meets or equals one of the listed
11 impairments, plaintiff is conclusively presumed to be disabled.

12 If the impairment is not one conclusively presumed to be
13 disabling, the evaluation proceeds to the fourth step, which
14 determines whether the impairment prevents plaintiff from

15 performing work which was performed in the past. If a plaintiff is
16 able to perform previous work, that Plaintiff is deemed not

17 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
18 this step, plaintiff's residual functional capacity (RFC)

19 assessment is considered. If plaintiff cannot perform this work,
20 the fifth and final step in the process determines whether

21 plaintiff is able to perform other work in the national economy in
22 view of plaintiff's residual functional capacity, age, education

23 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),

24 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

25 The initial burden of proof rests upon plaintiff to establish
26 a *prima facie* case of entitlement to disability benefits.

27 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

28 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is

1 met once plaintiff establishes that a physical or mental
2 impairment prevents the performance of previous work. *Hoffman v.*
3 *Heckler*, 785 F.3d 1423, 1425 (9th Cir. 1986). The burden then
4 shifts, at step five, to the Commissioner to show that (1)
5 plaintiff can perform other substantial gainful activity and (2) a
6 "significant number of jobs exist in the national economy" which
7 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
8 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

9 STANDARD OF REVIEW

10 Congress has provided a limited scope of judicial review of a
11 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
12 the Commissioner's decision, made through an ALJ, when the
13 determination is not based on legal error and is supported by
14 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
15 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9th Cir. 1999). "The
16 [Commissioner's] determination that a plaintiff is not disabled
17 will be upheld if the findings of fact are supported by
18 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
19 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is
20 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
21 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
22 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
23 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
24 573, 576 (9th Cir. 1988). Substantial evidence "means such
25 evidence as a reasonable mind might accept as adequate to support
26 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
27 (citations omitted). "[S]uch inferences and conclusions as the
28 [Commissioner] may reasonably draw from the evidence" will also be

1 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
2 review, the Court considers the record as a whole, not just the
3 evidence supporting the decision of the Commissioner. *Weetman v.*
4 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(*quoting Kornock v.*
5 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

6 It is the role of the trier of fact, not this Court, to
7 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
8 evidence supports more than one rational interpretation, the Court
9 may not substitute its judgment for that of the Commissioner.
10 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
11 (9th Cir. 1984). Nevertheless, a decision supported by substantial
12 evidence will still be set aside if the proper legal standards
13 were not applied in weighing the evidence and making the decision.
14 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
15 433 (9th Cir. 1987). Thus, if there is substantial evidence to
16 support the administrative findings, or if there is conflicting
17 evidence that will support a finding of either disability or
18 nondisability, the finding of the Commissioner is conclusive.
19 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

20 ALJ'S FINDINGS

21 ALJ Say found plaintiff was insured through December 31,
22 2010, for DIB purposes (Tr. 15, 17). At step one he found
23 plaintiff did not engage in substantial gainful activity after
24 onset on November 31, 2004 (Tr. 17). At steps two and three, he
25 found Mr. Schwarz suffers from sleep apnea, obesity, mild
26 arthritis of the left foot, and status post cardiac ablation in
27 2001, impairments that are severe but do not meet or medically
28 equal Listing level severity (Tr. 17, 22). At step four he found

1 plaintiff is able to perform past relevant work (Tr. 25).
2 Accordingly, the ALJ found Mr. Schwarz was not disabled as defined
3 by the Social Security Act at any time during the relevant period,
4 from onset through the date of the ALJ's decision, November 30,
5 2007 (Tr. 25-26).

6 **ISSUES**

7 Plaintiff alleges the ALJ erroneously weighed the evidence
8 and assessed credibility (Ct. Rec. 13 at 8-9). The Commissioner
9 asserts the ALJ's decision is supported by substantial evidence
10 and free of legal error. He asks the Court to affirm (Ct. Rec. 16
11 at 6).

12 **DISCUSSION**

13 **A. Weighing medical evidence**

14 In social security proceedings, the claimant must prove the
15 existence of a physical or mental impairment by providing medical
16 evidence consisting of signs, symptoms, and laboratory findings;
17 the claimant's own statement of symptoms alone will not suffice.
18 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
19 on the basis of a medically determinable impairment which can be
20 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
21 medical evidence of an underlying impairment has been shown,
22 medical findings are not required to support the alleged severity
23 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cr.
24 1991).

25 A treating physician's opinion is given special weight
26 because of familiarity with the claimant and the claimant's
27 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
28 1989). However, the treating physician's opinion is not

1 "necessarily conclusive as to either a physical condition or the
2 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
3 751 (9th Cir. 1989)(citations omitted). More weight is given to a
4 treating physician than an examining physician. *Lester v. Chater*,
5 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
6 given to the opinions of treating and examining physicians than to
7 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
8 (9th Cir. 2004). If the treating or examining physician's opinions
9 are not contradicted, they can be rejected only with clear and
10 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
11 ALJ may reject an opinion if he states specific, legitimate
12 reasons that are supported by substantial evidence. See *Flaten v.*
13 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
14 1995).

15 In addition to the testimony of a nonexamining medical
16 advisor, the ALJ must have other evidence to support a decision to
17 reject the opinion of a treating physician, such as laboratory
18 test results, contrary reports from examining physicians, and
19 testimony from the claimant that was inconsistent with the
20 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
21 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
22 Cir. 1995).

23 *Step two*

24 Plaintiff alleges the ALJ should have found that
25 fibromyalgia, atypical heart palpitations, chest pain, fatigue¹,

26
27 ¹To the extent fatigue is seen as a limitation caused by
28 sleep apnea, it is noteworthy that in January 2005, treating
physician Donald Howard, M.D., notes plaintiff "reports he has

1 and chronic hypertension are severe impairments (Ct. Rec. 13 at
2 11). The Commissioner responds (1) pain and fatigue are symptoms,
3 not medically determinable impairments; (2) the ALJ properly
4 rejected the opinion of a physical therapist as a non-acceptable
5 medical source, and (3) the ALJ properly rejected Dr. Dionne's
6 opinion fibromyalgia is disabling because the opinion is
7 internally inconsistent and based on plaintiff's unreliable self-
8 report (Ct. Rec. 16 at 11-14).

9 The ALJ points out there is no record of a tender point
10 evaluation, as directed by the American College of
11 Rheumatologists, and no rheumatological evaluation or follow up,
12 making the diagnosis incomplete² (Tr. 22).

13 To further aid in weighing the conflicting medical evidence,
14 the ALJ evaluated plaintiff's credibility and as noted found Mr.
15 Schwarz less than fully credible (Tr. 24). Credibility
16 determinations bear on evaluations of medical evidence when an ALJ
17 is presented with conflicting medical opinions or inconsistency
18 between a claimant's subjective complaints and diagnosed
19 condition. See *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir.
20 2005).

21
22 been sleepy like this for over two years" (Tr. 241), meaning
23 before onset and while he was working. In September 2005, Dr.
24 Howard recommended a trial of stimulants if sleep apnea
25 treatments were unsuccessful (Tr. 222, 359), and suggested it to
Dr. Dionne in February 2007 (Tr. 479-480). It does not appear
this was done.

26 ²A fibromyalgia diagnosis is based on pain elicited by
27 palpation of specific tender points (classically, 11 of the 18),
28 and a history of widespread pain in specific areas for at least
three months. MERCK MANUALS ONLINE MEDICAL LIBRARY

1 It is the province of the ALJ to make credibility
2 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
3 1995). However, the ALJ's findings must be supported by specific
4 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
5 1990). Once the claimant produces medical evidence of an
6 underlying medical impairment, the ALJ may not discredit testimony
7 as to the severity of an impairment because it is unsupported by
8 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
9 1998). Absent affirmative evidence of malingering, the ALJ's
10 reasons for rejecting the claimant's testimony must be "clear and
11 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
12 "General findings are insufficient: rather the ALJ must identify
13 what testimony not credible and what evidence undermines the
14 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
15 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

16 The ALJ's reasons are clear and convincing. The ALJ relied in
17 part on inconsistent statements, activities inconsistent with
18 allegedly disabling symptoms, and unexplained failure to follow
19 medical advice (Tr. 24-25).

20 Plaintiff testified that he is essentially incapacitated five
21 to eight days a month (Tr. 24). The ALJ points out some of Mr.
22 Schwarz's reported activities during the relevant period include
23 traveling to Hawaii for three weeks despite an ankle injury; scuba
24 diving; planning and cooking meals; managing a budget; shopping;
25 doing laundry and light housekeeping; swimming; driving;
26 performing home repair and maintenance, and attending weekly
27 church and Bible study sessions (Tr. 147, 201-203).

28 Plaintiff reports concentration and memory problems (Tr. 200)

1 but testing reveals no problems with attention, concentration, or
2 memory (Tr. 203).

3 Treating doctors told plaintiff on numerous occasions to
4 exercise and lose weight, but he failed to comply (Tr. 24-25; 249-
5 250, 317, 319). When he began seeing Dr. Dionne in December 2004,
6 plaintiff weighed 234 pounds (Ex. 1F/219-223, Tr. 18). In October
7 2006, he weighed 266 pounds (Ex. 2F/30-33), Tr. 21) In May 2005,
8 Dr. Dionne notes plaintiff failed to take reflux medication or
9 flonase regularly. Although celebrex, prescribed for pain, seemed
10 to help, he did not take it regularly. In May 2005 plaintiff
11 indicated he had not taken it in two or three weeks. Mr. Schwarz
12 did not return for laboratory studies as directed (Tr. 314, Ex.
13 1F/199-205), as the ALJ observes (Tr. 19).

14 The ALJ correctly relied on several factors, including
15 testimony inconsistent with prior statements and with reported
16 activities, and failing to follow medical advice, when he found
17 plaintiff less than completely credible.

18 The ALJ's reasons for finding plaintiff less than fully
19 credible are clear, convincing, and fully supported by the record.
20 *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
21 2002)(proper factors include inconsistencies in plaintiff's
22 statements, inconsistencies between statements and conduct, and
23 extent of daily activities). Noncompliance with medical care or
24 unexplained or inadequately explained reasons for failing to seek
25 medical treatment also cast doubt on a claimant's subjective
26 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885
27 F.2d 597, 603 (9th Cir. 1989).

28 In March 2007 an examining physical therapist opined

1 plaintiff was unable perform full time sedentary work (Tr. 436-
2 454). The ALJ properly rejected Mr. Strom's opinion because a
3 physical therapist is not an acceptable source as defined by the
4 applicable regulations.

5 On November 4, 2005, plaintiff told Dr. Dionne he felt he
6 "could possibly do other types of work." Dr. Dionne agreed
7 retraining for other work could be done (Tr. 305-306). About a
8 year later, in October 2006, Dr. Dionne opined plaintiff's
9 fibromyalgia is disabling (Tr. 464). There is nothing in the
10 record showing plaintiff's condition worsened. Citing *Bayliss*, the
11 Commissioner correctly observes contradictions between assessed
12 abilities and clinical notes, observations, and other opinions by
13 the same physician provide "a clear and convincing reason for not
14 relying on the doctor's opinion" (Ct. Rec. 16 at 12-13); *Bayliss*,
15 427 F.3d at 1216.

16 The ALJ properly rejected Dr. Dionne's opinions as
17 inconsistent, based on plaintiff's unreliable self-report, and
18 based on an incomplete diagnosis (Tr. 22, 24-25).

19 An ALJ is not required to credit opinions based on a
20 claimant's unreliable reporting. *Tommasetti v. Astrue*, 533 F.3d
21 1035, 1041 (9th Cir. 2008).

22 Plaintiff alleges Mr. Strom and Dr. Dionne's opinions support
23 greater limitations than the ALJ included in his RFC assessment.
24 Because the ALJ properly weighed these opinions and properly
25 assessed credibility, plaintiff fails to establish error.

26 Plaintiff alleges the ALJ should have found chest pain,
27 atypical heart palpitations, and hypertension are severe
28 impairments. The Commissioner is correct that pain is a symptom,

1 not a diagnosed impairment. In January 2005, Dr. Dionne notes
2 "chest pain with negative cardiac work-up and unremarkable
3 exam externally. . . I am inclined to think this is related
4 to his colon. No further evaluation at this time."
5 (Tr. 332).

6 After complaints of heart palpitations, tests in March 2005
7 were normal (Tr. 19, Ex. 1F/140-142). Blood pressure is noted as
8 poorly controlled in May and June 2005 (Tr. 19, 316-322), high but
9 not yet back on medications in May 2006 (Tr. 456), and
10 uncontrolled in March 2007 (Tr. 168). Plaintiff fails to establish
11 limitations from hypertension interfere in any way with his
12 ability to work.

13 In March 2006 treating physician Robert Bonneau, M.D., points
14 out plaintiff's nasal flow showed good improvement after he
15 underwent radiofrequency treatment in December 2005 [about a year
16 after onset] (Tr. 21, 170). In June 2006 plaintiff underwent
17 surgery for chronic right maxillary sinusitis (Tr. 21, Ex. 2F/28-
18 29).

19 In May 2007 plaintiff told Dr. Dionne he was doing pretty
20 well overall, intended to get more exercise and lose weight, and
21 was doing better with CPAP and RLS, although he still felt sleepy
22 at times (Tr. 22, Ex. 2F/47-52, 57-61). Despite complaints of
23 knee, ankle, and foot pain in October 2006, the ALJ observes that
24 June 2007 left foot and ankle x-rays show mild degenerative
25 changes and probable old fractures with some soft tissue swelling
26 (Tr. 21-22, Ex. 2F/30-33, 2F/54). At the October 2006 exam, Dr.
27 Dionne notes no crepitance or effusion of the knees. Plaintiff's
28 gait was normal (Tr. 21, Ex. 2F/30-33).

1 The ALJ is responsible for reviewing the evidence and
2 resolving conflicts or ambiguities in testimony. *Magallanes v.*
3 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
4 trier of fact, not this court, to resolve conflicts in evidence.
5 *Richardson*, 402 U.S. at 400. The court has a limited role in
6 determining whether the ALJ's decision is supported by substantial
7 evidence and may not substitute its own judgment for that of the
8 ALJ, even if it might justifiably have reached a different result
9 upon de novo review. 42 U.S.C. § 405 (g).

10 The Court finds the ALJ's assessment of the evidence is
11 supported by the record and free of legal error. Plaintiff's
12 remaining assignments of error have been addressed by the
13 foregoing.

14 CONCLUSION

15 Having reviewed the record and the ALJ's conclusions, this
16 court finds that the ALJ's decision is free of legal error and
17 supported by substantial evidence..

18 IT IS ORDERED:

19 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
20 **GRANTED.**

21 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
22 **DENIED.**

23 The District Court Executive is directed to file this Order,
24 provide copies to counsel, enter judgment in favor of defendant,
25 and **CLOSE** this file.

26 DATED this 19th day of May, 2011.

27 s/ James P. Hutton

28 JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT